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REASONABLY PRECISE SPECIFICATIONS AND THE MILITARY CONTRACTOR DEFENSE—THE ELEVENTH CIRCUIT MISAPPLIES THE BOYLE TEST: *BRINSON V. RAYTHEON CO.*

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AS A GENERAL RULE, federal law may preempt state law in matters involving "uniquely federal interests;" specifically, those areas of the law subject to federal control under federal laws and the Constitution.[1] In *Boyle v. United Technologies Corp.*, the U.S. Supreme Court held that "procurement of equipment by the United States" is one such area; and therefore, that suppliers of military equipment may enjoy immunity from liability under state law.[2] This immunity is not automatic.[3] Rather, suppliers of military equipment must meet the criteria set forth by the Supreme Court in *Boyle* before receiving the immunity.[4] In *Brinson v. Raytheon Co.*, the Eleventh Circuit erred in allowing the trial court's use of post-design, post-production data as evidence to satisfy the first prong of the *Boyle* test, thus erroneously allowing the defendant immunity.[5] In doing so, the Eleventh Circuit too broadly construed the type of evidence that may satisfy *Boyle*'s requirement of "reasonably precise specifications."[6]

Judson B. Brinson, an instructor in the Joint Primary Aircraft Training System Program (JPATS) and a captain in the U.S. Air Force, died in a plane crash on April 3, 2004, while co-piloting the T-6A Texan II (T-6A), an airplane manufactured by Raytheon Aircraft Company (RAC).[7] RAC designed the T-6A, a sin-

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1 487 U.S. 500, 504 (1988).

2 *Id.* at 507.

3 *Id.* at 507–08.

4 *Id.* at 507–12.

5 Brinson v. Raytheon Co., 571 F.3d 1348, 1351–52 (11th Cir. 2009).

6 *Id.*

7 *Id.* at 1349.

gle-propeller aircraft, to fly like a jet, as JPATS intended to use the aircraft to train pilots to fly jets.[8] In order to accomplish the jet-like flight of the T-6A, RAC included a trim aid device (TAD) on the T-6A.[9] The TAD automatically adjusted the aircraft's rudder to enable it to fly like a jet.[10] RAC developed and patented the TAD prior to construction of the T-6A aircraft, with no input from the government.[11] The plaintiff in *Brinson* contended that the malfunction of the TAD led to the crash of the T-6A and the death of Brinson.[12] Four months before the crash of the T-6A, the U.S. Air Force issued an order requiring inspection and replacement of Teflon-lined pushrods, a component of the TAD, on all T-6A model aircraft.[13] In this order, the Air Force required that the pushrods be replaced with identical pushrods, and the Air Force completed the installation of replacements in the aircraft flown by Brinson prior to the crash on April 3, 2004.[14] In 2006, after the crash at issue in *Brinson*, the military required the replacement of Teflon-lined rod ends on all T-6A model aircraft with rod ends of an alternate material.[15]

Julie Brinson brought suit against RAC individually and as the surviving spouse of Judson Brinson.[16] The U.S. District Court for the Middle District of Georgia granted RAC summary judgment, holding that the military contractor defense immunized RAC from tort liability under state law.[17] Julie Brinson appealed to the Eleventh Circuit, which affirmed the trial court's grant of summary judgment, holding that RAC put on sufficient evidence to satisfy the *Boyle* test, and stating that "post-design, post-production evidence" may be used to satisfy the *Boyle* standard.[18]

Although the "procurement of equipment by the United States is an area of uniquely federal interest," and thus qualifies as an area where state law may be preempted by federal law, federal law will only control in two instances: 1) when there is a conflict between federal policy and state law; or 2) when "the

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[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.* at 1350.
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.* at 1348.
[17] *Id.* at 1349.
[18] *Id.* at 1349–53.

application of state law would 'frustrate specific objectives' of federal legislation."[19] These guidelines gave rise to what is now referred to as "the military contractor defense," which grants military contractors immunity from liability under state law for design defects.[20] To enjoy this immunity, the contractor must prove that it acted at the direction of the government by establishing the three factors required by the Supreme Court in *Boyle*: 1) the United States approved "reasonably precise specifications;" 2) the equipment supplied by the contractor met those specifications; and 3) the contractor informed the United States of any dangers in using the equipment known to the contractor but unknown to the United States.[21] In essence, the contractor must be able to state "that the government made me do it" in order to enjoy immunity under the *Boyle* doctrine.[22]

Brinson argued that RAC did not produce summary judgment evidence sufficient to satisfy the first two elements of the *Boyle* test, but the first element was the major point of contention in the case and is the focus of this casenote.[23] In affirming the trial court's order, the Eleventh Circuit held that "post-design, post-production evidence may fit within the *Boyle* rationale," and thus it may be used to satisfy the first prong of the *Boyle* test.[24] The question of whether to allow post-design, post-production evidence to apply to the first prong of the *Boyle* test presented an issue of first impression for the Eleventh Circuit.[25] The Eleventh Circuit's decision to permit this type of evidence to satisfy the first prong of the *Boyle* test purportedly followed decisions of the Fourth Circuit in *Dowd v. Textron, Inc.* and the Second Circuit in *Lewis v. Babcock Industries, Inc.*[26]

The Eleventh Circuit correctly stated that the first prong of the *Boyle* test requires proving two separate factors: '"reasonably precise specifications and government approval of them.'"[27] In other words, if the contractor makes design decisions alone and the government only approves of "general guidelines," then the

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[19] Boyle v. United Techs. Corp., 487 U.S. 500, 507 (1988).

[20] *Brinson*, 571 F.3d at 1351.

[21] *Id.* (quoting *Boyle*, 487 U.S. at 507).

[22] *Id.*

[23] *Id.*

[24] *Id.* at 1353.

[25] *Id.* at 1352.

[26] *Id.* at 1353–54.

[27] *Id.* at 1351 (quoting Gray v. Lockheed Aeronautical Sys. Co., 125 F.3d 1371, 1377 (10th Cir. 1997)).

contractor will not be immune from state law liability.[28] The Eleventh Circuit cited two of its prior decisions to illustrate this point.[29] In *Gray v. Lockheed Aeronautical Systems Co.*, the defendant did not carry its summary judgment burden because it submitted to the government only a description of the requirements the design feature in question addressed, without ever submitting detailed drawings.[30] The Eleventh Circuit compared and distinguished this decision with *Harduvel v. General Dynamics Corp.*, in which the Eleventh Circuit ruled that the defendant did carry its summary judgment burden because the defendant showed that government engineers specifically reviewed and approved the design feature in question by analyzing blueprints and drawings and engaging in discussions with the defendant during the reviewing and approval of the design feature.[31] These cases were not dispositive of the issue, however, because RAC also presented evidence of the U.S. Air Force's order to inspect and replace the pushrods, well after the T-6A aircraft were designed and built, as pertinent evidence in meeting the requirement of the first prong of the *Boyle* test.[32]

The Eleventh Circuit first turned its analysis to an examination of the Supreme Court's reasoning in *Boyle* and concluded that the Supreme Court created the *Boyle* test to allow courts to identify the circumstances in which a '"significant conflict between federal interests and state law in the context of Government procurement'" exists.[33] Thus, the *Boyle* test essentially identifies circumstances when the military contractor defense should apply.[34] The Supreme Court in *Boyle*, citing § 2680(a) of the Federal Tort Claims Act, stated that although the Act allowed recovery against the United States for negligence of Government employees, it excluded claims '"based upon the exercise or performance . . . [of] a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."'[35]

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[28] *Id.* at 1351–52.

[29] *Id.* at 1352.

[30] *Id.* (citing *Gray*, 125 F.3d at 1374, *abrogated on other grounds by* Gray v. Lockheed Aeronautical Sys. Co., 155 F.3d 1342 (11th Cir. 1998)).

[31] *Id.* (citing Harduvel v. Gen. Dynamics Corp., 878 F.2d 1311, 1320 (11th Cir. 1989)).

[32] *Id.* at 1352.

[33] *Id.* (quoting Boyle v. United Techs. Corp., 487 U.S. 500, 511 (1988)).

[34] *Id.*

[35] *Id.* at 1353 (quoting *Boyle*, 487 U.S. at 511; 28 U.S.C. § 2680(a) (2000); 28 U.S.C. § 1346(b) (2000)).

The Supreme Court further stated that when the Armed Forces selects designs for military equipment, that selection process falls under the discretionary parameters of the Act because it involves balancing of design considerations, particularly "between greater safety and greater combat effectiveness."[36] The Supreme Court concluded that allowing state tort suits for these military decisions would abrogate the intention of the Act.[37] The Eleventh Circuit then extended the *Boyle* rationale, concluding that post-design, post-production evidence may be used to prove the first prong of the *Boyle* test, likening decisions by the military of how to address defective or failing parts to the decisions of the military in original equipment designs.[38]

The Eleventh Circuit found support for this decision in the Fourth Circuit's decision in *Dowd v. Textron, Inc.*[39] That case involved a fatal helicopter crash, and the Fourth Circuit held that the defendant established government approval of the design.[40] In doing so, the Fourth Circuit relied on two facts: 1) the Army investigated the specific design feature that caused the crash several years after its original design; and 2) the manufacturer and the Army exchanged information regarding the specific feature, the manufacturer suggested modifications to address the problem, and the Army rejected them.[41] The Eleventh Circuit also cited the Second Circuit's decision in *Lewis v. Babcock Industries, Inc.* as support for its conclusion.[42] *Lewis* involved spinal injuries to a pilot due to a failure of a specific design feature on a jet fighter.[43] The Second Circuit held that because the Air Force became aware of and investigated an issue with the specific design feature, and then addressed the problem by replacing the part at issue with new but identical parts, the contractor met the requirement of showing Government approval of "reasonably precise specifications."[44] The Second Circuit therefore allowed state tort law immunity for the manufacturer under the military contractor defense.[45]

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[36] *Boyle*, 487 U.S. at 511.

[37] *Id.* at 511–12.

[38] *Brinson*, 571 F.3d at 1353.

[39] *Id.* at 1353–54.

[40] *Id.* (citing Dowd v. Textron, Inc., 792 F.2d 409, 410 (4th Cir. 1986)).

[41] *Id.*

[42] *Id.* at 1354 (citing Lewis v. Babcock Indus., Inc., 985 F.2d 83, 87–89 (2d Cir. 1993)).

[43] *Id.*

[44] *Id.*

[45] *Id.*

Applying this decision to the facts of the case, the Eleventh Circuit concluded that RAC showed that the U.S. Air Force approved "reasonably precise specifications" of the TAD during its development by: 1) reviewing drawings of all components on the T-6A; and 2) reviewing the complete aircraft to ensure it complied with those earlier drawings.[46] But the Eleventh Circuit also concluded that in January 2004, after the product was designed, built, and deployed, the military knew of the design defect with the TAD and issued an order to address the problem: that order specifically required the replacement of failing pushrods with identical pushrods.[47] In dismissing the appellant's argument that the approval was not a "meaningful approval," as required by the *Boyle* test, the Eleventh Circuit held that appellee put forth enough uncontroverted evidence to give rise to a "persuasive indication" that the military gave "meaningful approval" and thus satisfied the first prong of the *Boyle* criteria.[48]

This conclusion by the Eleventh Circuit misapplies the requirements and motivation of the Supreme Court's decision in *Boyle*. First, the holding by the Eleventh Circuit in *Brinson* unnecessarily expands *Boyle* and makes the military contractor defense much easier to prove than originally intended. As the Eleventh Circuit discussed, RAC presented evidence of discussions between the Air Force and RAC during the design of the T-6A, review of RAC designs by the Air Force, and inspections by the government during the actual development of the T-6A.[49] This evidence is arguably enough to satisfy the *Boyle* criteria. The Eleventh Circuit then needlessly held that, essentially, evidence of reordering of parts by the Air Force could be included as evidence for purposes of satisfying the *Boyle* test.[50]

Additionally, the Supreme Court specifically noted that one of the primary reasons behind the military contractor defense is that the military must make decisions regarding safety and combat effectiveness to effectively pursue its goals.[51] If this is the

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[46] *Id.* at 1354–55.

[47] *Id.* at 1355.

[48] *See id.* at 1355–56 (detailing evidence showing that the Air Force examined drawings and work instructions of the TAD, reviewed the "as-built" configuration of the component, and was aware of the design defect in question).

[49] *Id.* at 1354–55.

[50] *Id.* at 1355.

[51] *Id.* at 1353 (quoting Boyle v. United Techs. Corp., 487 U.S. 500, 511 (1988)).

motivation behind the military contractor defense, then there is no reason to grant government contractors immunity for training equipment. The Eleventh Circuit ignores the fact that RAC developed the aircraft in question as a training device and not as equipment for use in combat settings.[52] Courts should allow more liberal construal of the military contractor defense for those products intended for combat use, as opposed to products such as the T-6A. In other words, in cases involving products that will never see combat, courts should view the military contractor defense with more skepticism and require greater evidence of military approval of "reasonably precise specifications" because the government should not have to balance between safety and combat effectiveness for training equipment.

Another distinction must be drawn between the *Brinson* case and the *Dowd* case. The evidence in *Dowd* showed that the original contractor suggested modifications based upon the known defect and that the Army rejected them.[53] But in *Brinson*, there was no evidence that RAC suggested modifications to address the defective rods in the TAD system on the T-6A.[54] The *Dowd* case represents the first reported decision where a court allowed post-design, post-production information as evidence under the first prong of the *Boyle* test.[55] After *Dowd*, the Second Circuit decided *Lewis*, which had facts analogous to the *Brinson* case before the Eleventh Circuit. Like the Eleventh Circuit in *Brinson*, the *Lewis* case also misapplied the *Boyle* test. In both *Brinson* and *Lewis*, the evidence suggested a unilateral decision by the government to address a design defect by replacing it with an identical component.[56] Courts should, at the very least, distinguish between circumstances such as those presented in *Dowd* and circumstances such as those presented in *Brinson* and *Lewis*—the former representing a situation where the government acts with the input of the contractor, and the latter representing situations where the government acts unilaterally.

Allowing post-design, post-production evidence to satisfy the first prong of the *Boyle* test should not be permissible when such evidence does not in any way indicate that the government approved of the component in question at the time of the development and building of the product itself. Allowing the

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[52] *Id.* at 1349.

[53] Dowd v. Textron, Inc., 792 F.2d 409, 410–11 (4th Cir. 1986).

[54] *Id.* at 1353–54 (citing *Dowd*, 792 F.2d at 410–12).

[55] *Id.* at 1353.

[56] *Id.* at 1354–56.

reordering of a part to suffice as evidence under the *Boyle* test is too easily exploitable; government entities order replacement parts from contractors on a regular basis. To hold otherwise essentially means that any time a member of the armed forces reorders a part, even if it is without discussions about possible defects with the contractor, then the contractor will be able to present some evidence that satisfies the first prong of the *Boyle* test. In essence, any simple reorder of any replacement part by the military may now be sufficient evidence of government approval of "reasonably precise specifications" under the *Boyle* test. This interpretation misinterprets and overly expands the military contractor defense.